No. 15,220

In the

United States Court of Appeals

For the Ninth Circuit

GLEN EARL GRIGG,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

Appeal from Judgment of the United States District Court for the Northern District of California, Northern Division

Honorable SHERRILL HALBERT, Judge

Appellee's Brief

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I.

THIS ACTION WAS PROPERLY REMOVED FROM THE STATE COURT TO THE UNITED STATES DISTRICT COURT

The complaint (R 9-14) alleges that the defendants are Harver Coon Gendel, Southern Pacific Company, a corporation, and "First Doe to Sixth Doe, Inclusive". It expressly postpones any charge against the Does. It does charge that Gendel and the Southern Pacific Company "were so negligent, careless and reckless in their care, custody and con-

trol, ownership and maintenance of said horses and mules as to allow said animals to stray or come upon said park overpass on U.S. Highway 40". The complaint further avers that the defendant Harver Coon Gendel is a resident of and domiciled in the State of California and that the defendant Southern Pacific Company is a corporation of the State of Delaware. Neither residence nor domicile is ascribed to the Does. The complaint thus charges a joint tort against the two named defendants and the cause is not removable on its face.

Appellant set the case for trial after the single appearance of the defendant Southern Pacific Company. On November 15, 1955, when the case was called for trial, the appellant announced that he was ready for trial as against the defendant Southern Pacific Company alone without service of summons and complaint upon the named resident defendants or upon the Does. At this point, the Judge of the state court asked the attorneys for appellant what disposition they were going to make of the defendant Gendel, and they responded with motion for dismissal without prejudice, which was granted (R 30, 31). The appellee Southern Pacific Company then stated to the court that the cause had become removable for the first time, that it would immediately file a petition in the United States District Court for such removal, upon the ground that by said election and dismissal, the appellant voluntarily eliminated from the case the sole resident defendant, to-wit, defendant Gendel, and elected to proceed to trial against the non-resident defendant (Southern Pacific Company) alone. This position was upheld on appellant's motion to remand.

It is well settled that if the plaintiff voluntarily dismisses, discontinues, or in any way abandons the action as to the resident joint defendant, the cause then becomes removable,

and may, upon prompt action, be removed by the nonresident defendants who have been served. See *Stamm v. American Tel. & Tel. Co.,* 129 F. Supp. 719, 721, and the cases therein cited.

This question under similar facts was before this Honorable Court in *Southern Pacific Company v. Haight,* 126 Fed. (2d) 900. In that case the plaintiff sued the Southern Pacific Company and two fictitiously named operating employees of said company, who were alleged to be residents of California, and charged joint negligence against all of said defendants. When the case was called for trial, the plaintiff announced herself as ready for trial without service of summons and complaint upon said fictitiously named defendants (employees), and voluntarily elected to proceed with the trial of the case against the Southern Pacific Company alone. The defendant Southern Pacific Company immediately asserted that such election amounted to a complete severance of the action as to it and secured removal to the District Court. The facts in the *Haight* case are identical to the facts in the case at bar, with the exception that here the Does were not charged, and in addition to the election to proceed to trial against the non-resident defendants alone, the appellant here formally dismissed as to the defendant Gendel. This court held that the *Haight* case was properly removed, and in adopting the rule of *Berry v. St. Louis & S. F. R. Co.,* 118 Fed. 911, stated at page 904:

> "It is our opinion and we hold that the rule of the Berry case, supra, is sound, and that the plaintiff in the instant case having petitioned the court to set the case for trial and having announced that she was ready to proceed with the trial against the Southern Pacific Company, each at a time when only the latter defendant had been brought into court, had abandoned the joint character of her action, and rendered the cause immediately removable to the District Court."

Since the appellant in the case at bar announced that he was ready to proceed with the trial against the appellee, at a time when only the latter had been brought into court, he voluntarily abandoned the joint character of his action which in itself rendered the cause immediately removable. The subsequent dismissal of the defendant Gendel added nothing to the case's removability, as removability pre-existed the dismissal.

Appellant contends that the case was improperly removed for the reason that the petition for removal was premised upon the ground that the appellant dismissed as against all resident defendants, and he dismissed as to the defendant Gendel only, leaving the action still pending against the fictitious defendants. In the first place, the appellant misconstrues the petition for removal. It does not aver that appellant dismissed as to the fictitious defendants but quotes Paragraph II of the complaint to show that there was no cause of action stated. The petition also states that no person was served as a Doe and that there had been no appearance by anyone other than the defendant Southern Pacific Company. Paragraph VI of the petition states that on November 15, 1955, said action came on for trial in the state court upon the plaintiff's complaint and the answer of the defendant Southern Pacific Company, and at that time plaintiff "voluntarily dismissed said action as to *all defendants therein,* except as to the defendant Southern Pacific Company", and that after such dismissal "said action involved * * * a controversy wholly between citizens of different states".

We submit that the petition is subject to but one construction; that is, since the complaint does not state a cause of action against the Does, the dismissal as to defendant Gendel was a dismissal "as against *all defendants therein*

except defendant Southern Pacific Company." Therefore, the case was properly removed on the ground set forth in said petition. This question was before this Honorable Court in *Thiel v. Southern Pacific Company,* 126 Fed. (2d) 710.

In the *Thiel* case, the complaint set forth Southern Pacific Company and "First Doe, Second Doe, and Third Doe" as defendants. The complaint also alleged that one of the railroad company's special police and other of its agents were guilty of specific negligence and that its conductor was also guilty of acts of negligence. The case was removed by the railroad company on the ground of diversity of citizenship. The plaintiff contended that the District Court had no such jurisdiction because of the Does. In rejecting the appellant's contention this Honorable Court stated, at page 711:

> "* * * Appellant nevertheless contends that this is not a suit of which the district courts of the United States are given jurisdiction, because, says appellant, the controversy is not wholly between citizens of different States. In support of his contention, appellant points to the caption of his complaint, which names as defendants not only appellee, but also 'First Doe, Second Doe and Third Doe.'
>
> "Appellant's contention must be rejected; for, although the Does are named as defendants in the caption of the complaint, the complaint states no cause of action —no claim upon which relief can be granted—against the Does or either of them. It not only fails to show who the Does are, but also fails to show any relationship whatever between the Does and appellant or between the Does and appellee, or that any legal duty was ever owed by the Does to appellant. Much less does it show that such duty was breached.
>
> * * * * * * *
>
> "The complaint does not give the names of the officers, agents or conductors mentioned therein, nor does

it identify or attempt to identify any of them with any of the Does. In so far as it refers to the Does, the statement that 'said defendants * * * accepted [appellant] as a passenger and then * * * failed to take any reasonable precautions for his safety' is meaningless; for it does not appear that the Does were carriers or agents or employees of carriers, or had anything to do with the acceptance or rejection of passengers, or owed any duty whatever to appellant. The characterization of their conduct as 'careless and reckless' merely expresses a conclusion of the pleader—a conclusion which the pleaded facts do not warrant.

* * * * * * *

"After the suit was removed, appellant moved the District Court for leave to amend his complaint so as to name as defendants, in the place of First Doe and Second Doe, Frank Elton Cosgrove and Otto Sorenson, citizens of California, and so as to state (or attempt to state) a cause of action against them; appellant being under the delusion that he could thereby defeat the District Court's jurisdiction and compel a remand of the suit to the State court. The proposed amended complaint and the motion for leave to file it are included in the record on this appeal, but may not be considered by us in determining whether the suit was removable; for that question must 'be determined according to [appellant's] pleading at the time of the petition for removal.' Pullman Co. v. Jenkins, 305 U.S. 534, 537, 59 St. Ct. 347, 349, 83 L.Ed. 334."

The *Thiel* case was followed in *Ronson Art Metal Works v. Hilton Lite Corp.*, 111 F.Supp. 691, where a similar contention was made. In this case a non-resident defendant, one Hubbard, was actually served as a Doe, and a point arose on plaintiff's motion to remand as to whether the petition for removal, which had not been joined in by Hubbard until long after it was filed, was defective under the rule requir-

ing all defendants to join in the petition. The court stated as follows at page 694:

> "Nowhere in the complaint is Hubbard mentioned by name as a defendant. The complaint alleges that plaintiff does not know the true names of the defendants Does I to V, inclusive, and therefore sues them under said fictitious names; *plaintiff prays that their true names may be inserted therein upon ascertainment, together with appropriate charging allegations.*
>
> "* * * On September 4, 1952, all persons who were named as defendants joined in the petition for removal. On that date, there were no other known defendants from any examination of the record. *The complaint not only did not give the true names of the Does, but stated affirmatively in effect that it had not charged the Doe defendants in the complaint, and permission would be sought at a later time to charge them.*
>
> "As stated in Thiel v. Southern Pacific Co., 9 Cir. 1942, 126 F.2d 710, 711, 'although the Does are named as defendants in the caption of the complaint, the complaint states no cause of action—no claim upon which relief can be granted—against the Does or either of them. It not only fails to show who the Does are, but also fails to show any relationship whatever between the Does and appellant or between the Does and appellee, or that any legal duty was ever owed by the Does to appellant. Much less does it show that such duty was breached. * * * No cause of action having been stated against the Does, they must be disregarded in determining whether the suit was removable.' I find that the failure of Hubbard to join in the original petition for removal under all the circumstances of this case does not make it necessary that the motion to remand be granted." (Emphasis added.)

Even if the law were otherwise, the case should not have been remanded for the reason that the petition showed on

its face ample facts to support the removal on the *Haight* case theory that the appellant had abandoned the joint character of the action by his announcement or election to proceed to trial against the Southern Pacific Company alone, without service upon the Does (R 21, 28, 33, 35, 37). The District Court was not confined to the allegations of the petition for removal, if the record otherwise disclosed a case over which it had jurisdiction. In *Ellis v. Davis,* 4 F.2d 323, the cause was removed to the Federal Court upon a petition stating that the cause arose under the constitution and the laws of the United States. On motion for a remand it was shown that the moving defendant was in error as to that ground but, since the plaintiff's petition showed diversity of citizenship, the motion to remand was properly denied. At page 323 the court stated:

> "* * * The court is not confined to the allegations of the petition for removal, if the record otherwise discloses a case of which the federal court has jurisdiction."

Ellis v. Davis, supra, was cited in *Doggett v. Hunt,* 93 F. Supp. 426, where on motion to remand the court held that any deficiency in the allegation for the petition for removal concerning the jurisdictional amount was cured by the allegations of the plaintiff's complaint which was attached to the petition.

Therefore, whether or not the complaint of appellant stated a cause of action against the fictitious defandants, the cause became removable when plaintiff elected to proceed to trial against the Southern Pacific Company alone and the petition sufficiently stated that fact.

Lastly, it is contended by appellant that the appellee did not make a timely petition for removal and further submitted itself to the jurisdiction of the state court and

hence was estopped to remove the case to the federal court. This contention is apparently based upon the allegations set forth in the affidavit of Charles J. Miller (supporting motion to remand cause) in which it is set forth that the Southern Pacific Company was orally notified more than thirty days prior to the trial date that a dismissal would be entered as to the defendant Gendel and, further, that prior to the entry of said dismissal the Southern Pacific Company had subjected itself to the jurisdiction of the state court "by numerous stipulations and occurrences." In this contention the appellant overlooks that the cause did not become removable until immediately following plaintiff's said election to proceed to trial (or until the actual entry of said dismissal) against appellee.

This precise point was before this Honorable Court in *Southern Pacific Company v. Haight, supra,* where the plaintiff argued in the District Court, in seeking a remand, that the petition to remove was not timely as it should have been made at least immediately after the service of the memorandum to set cause for trial. This court disposed of this contention by holding that so long as it does not appear of record that the case is removable, no one can remove it, and that the case was not removable at the time of the service of the motion to set the case for trial for the reason that the plaintiff did not move for the severance of the joint cause of action until the case was called for trial.

Further, since the rendition of the *Haight* case, Section 1446 of Title 28 U.S.C.A., has been adopted and this section in part provides:

> "If the case stated by the initial pleading is not removable, a petition for removal *may be filed within twenty days* after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first

be ascertained that the case is one which is or has become removable." (Emphasis added.)

The first "motion, order or paper from which it may first be ascertained" that this case had become removable was the appellant's announcement in open court that he would proceed to trial against the Southern Pacific Company alone and his motion to dismiss defendant Gendel. Attempted removal in advance of that would have been premature. *Houpburg v. Kansas City Stockyards Co.,* 114 F. Supp. 659; *Stamm v. American Tel. & Tel. Co., supra,* 129 F. Supp. 719. Since the right did not exist at the time of the facts urged by appellant, it could not have been waived by appellee.

II.

STATEMENT OF THE CASE

(A) The Issue Upon Which the Cause Was Tried.

As shown heretofore, the complaint charges the following specific negligence:

> "* * * the said defendants, and each of them, owned, possessed and controlled, and has (sic) in their sole care and custody certain mules or horses in the immediate vicinity of said Park Overpass, U. S. Highway 40, approximately one mile west of Sacramento, California, and were so negligent, careless and reckless in their said care, custody and control, ownership and maintenance of said horses and mules as to allow said animals to stray or come upon the said Park Overpass on U. S. Highway 40 and into and upon the main traveled portion of said highway, and into the path of the plaintiff's oncoming car, * * *". (R 11)

The answer of the defendant Southern Pacific Company denies this specific charge of negligence. The case proceeded to trial before the District Court upon that issue. Thereafter

the case was submitted and the Honorable Judge found for appellee, stating, "I find that the animals in question were outside the control, custody or ownership of the defendant Southern Pacific Company and were in truth and in fact in the custody, control and ownership of the consignee * * *." (R 380)

After judgment appellant sought an order granting leave to file an amended complaint purportedly to conform to the evidence.[1] By this method the appellant endeavored to abandon his initial charge of negligence and adopt a new one, to-wit, that the defendant Southern Pacific Company negligently and carelessly allowed and permitted its consignee, Mr. Coon (improperly sued as Harver Coon Gendel), to use its premises in a dangerous and careless manner, or, specifically, that having permitted Coon to use its wooden corrals, when it saw that Coon was feeding his mules and horses outside said wooden corral, the Southern Pacific Company should have directed him to place the animals back in the corrals or to remove them from its property. This belated theory is entirely beyond the issues and the District Court properly denied appellant's motion to amend its complaint to set forth this new and different cause of action.

(B) Statement of Facts.

In view of the fact that the appellant's general statement of the evidence is incomplete, inaccurate and is stated for the purpose of finding support for a new and different cause of action than that upon which the case was tried, it is necessary to restate the facts briefly:

On the 9th day of December, 1954, one Haas Owens shipped on the Texas Pacific at Texarkansas, Texas, two

1. The record does not set forth a copy of the notice of motion to amend the complaint to conform to the evidence but a copy of the order denying such motion appears in the record (R 52).

carloads of horses and mules consigned to Coon at Sacramento, California, pursuant to a certain uniform livestock contract, specifically providing that the shipper will load and unload the animals at his own risk and expense (R 362). These two carloads were delivered to the Southern Pacific Company at Bakersfield, California, for carriage by it to Sacramento, California. They arrived at the corrals of the Southern Pacific Company, West Sacramento, California, on December 16, 1954, at 10:00 o'clock A.M. Upon their arrival, Coon, the owner thereof (R 150) took possession of the horses and mules and unloaded them into the wooden corrals. Mr. Anthony Perine (the industrial clerk (R 133)), whose duties are to tag and seal cars and also to inspect and count livestock upon arrival and departure and also to water and feed stock when it is the carrier's obligation to do so, was not in charge of the corrals as stated on page 15 of the appellant's brief. Mr. Sigmund A. Fisher, Freight Agent, is in charge of the corrals (R 281). Mr. Perine arrived at the corrals at 10:30 o'clock A.M. and found that Coon had unloaded one car and was unloading the second. He remained there for about ten or fifteen minutes, inspected them and counted them after they were confined in the corral (R 116, 121). Perine did not in any way assist Coon in the unloading since he had taken complete charge of them (R 117, 121). In other words, Coon "took care of everything—Perine just counted the horses and mules" (R 139). Mr. Fisher, the Freight Agent, also testified to the same effect (R 311-312). Coon also fed and watered his own animals (R 314).

After a shipment of livestock arrives at its destination, the consignee has twenty days in which to divert it to a new point of destination at the through rate, and if the same is not diverted within that time limit the full local rate from destination to diversion point will be assessed (R 310).

When this shipment arrived in West Sacramento, the Southern Pacific Company did not know what Coon was going to do with that shipment, that is, whether it would remain in Sacramento or be later diverted (R 313).

These wooden corrals were maintained in West Sacramento for the loading, unloading, feeding, watering and resting of livestock, and are inspected periodically by Mr. Fisher and repaired if required (R 282). No charge to the shipper or consignee is made for the use of the corrals at the point of destination but is a part of the service (R 316). At the time in question these wooden corrals were in good condition (R 254).

Outside the corrals there was a partial old fence with two strands of wire (R 257-259). This did not enclose any area, but the shipper Coon had strung one strand of wire for about one-third of the distance of the two-wire fence in order to make an enclosure (R 258, 259); "just to hold stock in there if they were watched" (R 257). This makeshift partial fence was not maintained by the Southern Pacific Company for shippers' use or otherwise, and no authority was given to anyone by the Company to use it (R 316). It was a temporary fencing, devised by Coon for these horses and mules.

While Mr. Perine was off duty (R 127) (he was on duty from 4:00 P.M. to midnight) he was going to his mother's home at 10:00 A.M. on December 17, 1954, (R 128) and he passed the corrals and observed the mules and horses grazing all through the area immediately outside the wooden corrals and Coon was there watching them (R 126, 127). Mr. Perine merely said "Hello" to Mr. Coon and went on his way. At about 3:45 P.M. on the same day Mr. Perine left his mother's home and again passed the corral and again saw Coon and the horses and mules were in the same general

location. At this time he had no conversation with Mr. Coon (R 128). Mr. Perine made no report to his employer about these animals being fed outside the corral (R 133).

The exact time the mules and horses strayed upon the freeway some 1½ or 2 miles distant (R 160) is not revealed by the record. The record does show, however, that at approximately 5:30 P.M. George Houcke, a California Highway Patrolman, received a call that there were horses on the freeway in the vicinity of Riske's Overpass, U. S. Highway 40 Freeway (R 156) and the accident occurred shortly after said officer arrived at the scene. No diversion order changing the destination of the shipment from Sacramento was received until 4:00 P.M. on December 18 (R 294), almost a full day after the accident occurred.

Based upon the foregoing facts the trial court found that the exclusive custody, control and ownership of the horses and mules were in the consignee, Mr. Coon, and that the defendant Southern Pacific Company was free of negligence in the matter.

(C) Argument.

1. THE FINDING AS TO POSSESSION AND CONTROL OF THE HORSES AND MULES IS FULLY SUPPORTED BY THE EVIDENCE.

The trial court found that between the time Mr. Coon started to unload the animals and the time of the diversion order the defendant Southern Pacific Company had no possession or control of said horses or mules, and their sole and exclusive care, custody, ownership and/or maintenance was with said H. L. Coon. The court therefore held that the allegations of the complaint were unsubstantiated as to appellee. The evidence warrants and supports said finding, in that the evidence shows that Coon voluntarily proceeded to unload his said livestock pursuant to the provisions of the livestock contract, watered, fed them, and took exclusive

custody and control thereof. Further, the evidence shows that the Southern Pacific Company did nothing relative to these animals whatsoever other than to count them and inspect them when they arrived in Sacramento. This conduct of the Southern Pacific Company took ten to fifteen minutes and thereafter it did nothing relative to the horses and mules, but they remained in the possession, control and custody of H. L. Coon. The corrals were in good condition.

The appellant makes much ado as to whether or not the shipment had arrived at its destination or whether the same was in transit at the time of the accident (on the evening of December 17, 1954). The fact is that at the time of the accident the shipment had arrived at its destination pursuant to the contract as it stood then. However, the argument seems pointless for even if the livestock shipment had stopped in Sacramento in transit for the purpose of feeding, watering and resting as contended by the appellant, then the matter of custody and control be unaltered. Page 13 B of Applicable Tariffs 188-G provides:

> "Rules and regulations indicating charge governing ownership, sorting and/or consolidating in transit of livestock at Roseville, Sacramento, San Francisco and Stockton, California, rules and regulations * * *:
>
> "The custody and possession of livestock while feeding, watering, resting, sorting and/or consolidation shall be that of the owner and not the carrier." (Defendants' Exhibit A, R 311)

The trial court's finding is strongly supported by the decision of *Rutherford v. Reilly,* 104 Cal. App. (2d) 629, 232 P.2d 34. In this case the question was whether the operator of a boarding stable for horses was liable for injuries caused by a horse which escaped from its box stall while its owner was in the act of placing a halter on it preparatory to

exercising the horse. The defendant Reilly owned a horse which he boarded at the defendant's stables with the provision that at any time he could go directly to the stable and procure his horse for any purpose he chose, among other things for exercising it on the riding ring at the stable. On the occasion in question, Reilly went directly to the stall carrying a halter and a 50 foot "lunge" rope, his purpose being to exercise the horse on the premises. When Reilly opened the door of the stall the horse bolted the open door and ran into the street. The foreman of the stable and Reilly pursued the horse which tended to excite him and the horse collided with an automobile driven by plaintiff, with resultant injuries. The trial court held that the possession of the horse was controlled by the two defendants and that both defendants negligently permitted the aforesaid horse to escape from the stable. In reversing the lower court, the court on page 630 stated:

> "On the facts narrated it is plain that Reilly was entitled to and was in exclusive possession of the horse from the moment he opened the stable door and that the possession of the academy as bailee thereupon ceased. The court's finding to the contrary is not supported by the evidence. The horse escaped from the stall through the act of Reilly and through no act of the academy, negligent or otherwise. * * *
>
> "From what has been said it is apparent that no legal liability of the academy was shown for the injuries sustained by plaintiff, and hence we do not discuss other errors assigned."

The *Rutherford* case is decisive of the case at bar. The rights and obligations between the Railroad Company and the shipper of livestock are governed by the uniform livestock contract, and applicable tariffs. Under the livestock contract the shipper at his own risk and expense will load

and unload the animals. Once unloaded, Coon was obligated to and did assume full custody and control of the animals. The company had no duty or obligation until after the diversion order was delivered and the shipper had reloaded the livestock into the cars. If Reilly had the possession and control of his horse as soon as he opened the stall door, likewise Coon had the control of the horses and mules as soon as he commenced to unload the same and particularly on the next day when he let them out of the corrals to be fed and grazed immediately outside the corrals. Therefore, Coon, like Reilly, "was entitled to and was in exclusive possession * * * from the moment he opened the stable [corral gate] door and the possession of the academy [or the railroad] as the bailee thereupon ceased". If the Railroad Company never assumed the control and possession of the livestock but merely determined that the owner Coon had done so, no negligence could be premised upon "their care, custody and control, ownership and maintenance of said horses and mules" as to allow said horses to stray. Therefore, there was ample evidence to support the judgment and, like the *Rutherford* case, there can be no legal liability of the Railroad Company when its possession and control had ceased about two days prior to the straying of the animals.

2. NO NEGLIGENCE CAN BE PREMISED ON THE ACT OF ANTHONY PERINE IN SEEING THE ANIMALS OUTSIDE THE CORRALS UNDER THE CARE OF THEIR OWNER, COON.

Under this heading the appellant has deviated entirely from the issue made by the pleadings and upon which the case was tried. Now it seems to be conceded that Mr. Coon had possession and custody of the horses and mules but was handling them in a dangerous manner. With this background appellant contends that the defendant Southern Pacific Company's agent, Anthony Perine, was present and knew

or should have known that allowing 50 horses and mules to be fed outside the corrals in the vicinity of a public street was such a hazard that he had the duty to direct Mr. Coon to place the animals back in the Southern Pacific Company corrals or to remove them from the property of the Southern Pacific Company and his failure to do so was negligence, which was imputed to the appellee.

Our discussion under this heading is premised solely upon the assumption that under some hypothesis appellant's contention hereunder may be within the issues and is done solely because we desire to answer every point made by the appellant in his said brief.

In the first place the appellant has overlooked that the court found by its finding No. 7 (R 46) that H. L. Coon negligently and carelessly permitted or allowed said horses and mules to stray upon said parkway overpass on said U. S. Highway 40 "without any participating act or omission by the defendant Southern Pacific Company" and, therefore, if there is any fact supporting this finding, the District Court's opinion must be affirmed.

Plaintiff's witness, Don Courtney, testified that the wooden corrals were in good condition and that they had always held livestock (R 254) and the horses and mules were let out of the corrals into a makeshift wire enclosure[2]. The witness Courtney further testified that "Mr. Coon and Tex stretched one extra wire across the—I would say the length of this room—*just to hold stock in there if they were watched*" (R 256, 257). It was further shown that Coon was a good livestock man (R 163). On this record the District Court was eminently entitled to find that appellant had not proved that Perine knew or should have known of any risk, reasonable or otherwise, of the stock's escaping.

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2. The enclosure was made by Coon adding one wire strand for one-third of its length (R 259, 262).

Further, there was no evidence that the Southern Pacific Company permitted Mr. Coon to use this area of its property. The evidence in this regard was to the contrary in that Mr. Fisher testified that the makeshift fence was not maintained by the Southern Pacific Company for shippers' use nor had he given anyone authority to use the same (R 316).

However, if we assume for the purpose of argument that the presence of these horses and mules did constitute a dangerous use of the premises even if properly herded, still there is no proof that the Southern Pacific Company had any knowledge of that practice nor any opportunity to correct it. The only employee of the company who saw these horses and mules was Perine. The evidence in this regard shows that Mr. Perine was an industrial clerk, was not in charge of the West Sacramento corrals, but only counted and inspected shipments and fed and watered them when the carrier was obligated to do so. He worked a shift from 4:00 P.M. to 12:00 midnight. He went off duty at 12:00 midnight on the 16th day of December, 1954, and at or about 10:00 or 10:30 the next morning he was walking over to see his mother and went by the corrals (R 127, 128), and saw the animals outside the corrals but being properly herded by Mr. Coon. He said "Hello" to Mr. Coon and did nothing further. Shortly prior to 3:45 that afternoon he left his mother's home and was walking to work (R 128) (under the same circumstances) but did not speak to Mr. Coon. It is obvious that Perine was not engaged in his employer's business when he saw these horses and mules outside the corral.

Appellant contends when Mr. Perine saw these animals outside the corral, he was obligated to then and there see that they were returned to the corral before they strayed. This duty, if one, has to be premised upon his obligation to act for and on behalf of his employer. As an individual, Mr.

Perine certainly owed no such duty. Likewise, he was only bound to act for or on behalf of his employer when he was engaged in performance of his employer's business and acting in the scope and course of his employment. The times that he saw these animals outside the corral were during his off hours, or when he was off duty. No negligence of his employer can be premised upon Mr. Perine's said conduct for the following reasons:

(a) When an employee is off duty the relation of employer and employee is suspended and does not reattach until the employee resumes the master's work (*Fireman's Fund etc. Co. v. Ind. Acc. Com.,* 39 Cal. 2d 529, 532).

(b) Even if he was on duty, a shipper's use of a corral was not within the scope and course of his employment as an industrial clerk. Mr. Perine's duties in reference to the corral were merely to count and inspect and feed and water livestock in transit if required.

(c) Notice to an off duty employee is not imputed to his employer, 2 Cal. Jur. 2d 861.

The finding of the trial court that the defendant Southern Pacific Company did not participate by act or omission in the negligence of H. L. Coon is thus further substantiated and even though not raised by the pleadings, the issue was properly resolved against appellant.

3. THERE IS NO EVIDENCE OF ANY NEGLIGENCE OF THE APPELLEE IN FAILING TO PROVIDE ADEQUATE FACILITIES AND CORRALS FOR THE HOUSING OF ANIMALS.

Under heading II, the appellant contends that under state and federal statutes a common carrier who transports livestock for hire may not lawfully confine said livestock in cattle cars for more than 36 or 28 hours respectively without unloading for rest, water and feeding in properly equipped pens. The appellant then cites several cases holding that a

carrier is liable to the shipper for loss or injury to cattle which are injured by the failure of the carrier to provide adequate facilities and corrals for feeding and watering cattle in transit. The appellant admits that all of these cases deal with the duty of the carrier to the shipper arising out of the contract of carriage.

From this obligation of the carrier to the shipper to provide adequate pens for livestock in transit, the appellant endeavors to imply that the carrier also became liable to third parties for any negligence of the shipper in his care of his livestock when the latter were under his custody and control. The appellant cites no authority for this assumption and there is no legal basis for any such assumption and particularly so under the circumstances existing in the case at bar.

First, there was no proof that the livestock escaped because of the inadequacy of the corrals. The evidence conclusively showed that the corrals were in good condition and the animals would not have escaped thereform if the consignee had not taken them therefrom to graze on the area outside the corrals. Therefore, if there was a duty to a third party to provide adequate pens for these animals, there was no breach of that duty proven.

Secondly, it has already been shown that the livestock was not in transit but had been received by the consignee at its destination. It is true that the appellee permitted the consignee to use the corrals but that permission was not a part of the contract of carriage but was in the form of an ordinary license. The appellee's liability (if any) is not different from the liability of any other licensor. Since a licensor is not liable to third parties for the negligence of its licensees (see *Rutherford v. Reilly, supra*) there can be no liability of the appellee for any negligence of Mr. Coon under the facts of this case.

Thirdly, the livestock was under the exclusive care, control and custody of Mr. Coon and the animals escaped through his carelessness in his said control and care of them. Under no circumstances would the appellee be an insurer or guarantor of the safety of third parties from Mr. Coon's conduct in his own care and custody of his own animals.

Lastly, when the shipment arrived at its destination Mr. Coon accepted and unloaded the animals and the contract of carriage then ended, together with any control, custody or care that the appellee may have had during transit. With the termination of this relationship, there was nothing for the carrier to delegate to the shipper as all of its duties as a carrier likewise ceased and terminated. What occurred thereafter relative to reshipment is immaterial for the shipment was not diverted until 24 hours after the accident.

4. ANY DUTY OF A COMMON CARRIER TO EXERCISE REASONABLE CARE TO SEE THAT THE ANIMALS CANNOT ESCAPE WHILE THE SAME ARE IN TRANSIT HAS NO APPLICATION TO THE CASE AT BAR.

Under this heading the appellant relies upon Section 1714 of the Civil Code of California and Section 423 of the Agricultural Code of said state but these sections have no application when the party sought to be charged did not own and/or possess the livestock in question. Section 1714 covers only a liability for injuries occasioned to another by his negligence "in the management of his property". Section 423 covers liability of a "person owning or controlling the possession of any livestock" for injuries occasioned by permitting livestock to stray unaccompanied upon any public highway. Since the appellee was neither the owner nor the possessor of the livestock at the time in question, these sections clearly are not applicable. To circumvent this situation, the appellant contends that the evidence supports a conclusion that the animals were in continuous transit from

Texarkansas, Texas, to Santa Rosa, California, and were stopped merely at Sacramento to feed, water and rest in order to conform to the State 36 hour rule and the Federal 28 hour rule for the watering, feeding and resting of livestock in transit. The appellant then argues that since the animals were removed from the cars at Sacramento to comply with these statutes, the animals were in the care, custody and control of the appellee. It is difficult to follow this argument for the applicable tariff provides to the contrary. Item J of the applicable tariff (R 308) provides:

> "The custody and possession of livestock while feeding, watering, resting, sorting and/or consolidation shall be that of the owner and not the carrier."

Further, Mr. Coon assumed exclusive possession and control over the animals when they arrived at Sacramento, so that in any event the fact remained that his livestock escaped from his exclusive control, custody and possession.

Therefore, whether it is considered that the shipment arrived at its destination on December 16 or whether the shipment merely stopped in Sacramento to comply with the said feeding and watering statutes, the same condition existed, that is, that under the law and the contract of carriage, the exclusive possession, control and custody of the shipment was in the consignee and further as a matter of fact Mr. Coon had such possession, control and custody.

5. THE FINDINGS ARE SUPPORTED BY THE EVIDENCE.

(a) Paragraph III of the Findings of Fact Is Supported by the Evidence.

Under this contention the appellant contends that the purported wire enclosure was the stock corral. During the trial of the action the court and the parties agreed that the word "corral" had reference only to the wooden corral (R 252) and the wooden corral was admitted to be in good

condition. There is no evidence that the appellee constructed or maintained the purported wire fence but the evidence is to the contrary. Mr. Sigmund A. Fisher testified that the make-shift fence was not maintained by the Southern Pacific Company for shippers' use and that he gave no authority to anyone to use it (R 316). As shown heretofore, Don Courtney testified that there was a two-wire fence over about two-thirds of the area but the same did not enclose any area, but to the contrary left an open spot for about one-third of the distance. Mr. Coon and his employee, Tex, strung one wire over this unfenced portion in order to "hold these horses and mules when being watched". We submit that the testimony of Mr. Courtney would not sustain a finding that this makeshift fenced area was constructed and maintained by the appellee.

(b) Findings Nos. IV and V Are Supported by the Evidence.

These findings are taken directly from the uniform live-stock contract and, further, were taken from the way-bill as it read on the 9th day of December, 1954, the date of shipment. In fact, the way-bill stayed in that status until the 18th day of December at 4:00 P.M., or approximately 24 hours after the accident. When the diversion order was delivered, then the destination on the way-bill was stricken out and a new destination inserted.

(c) Finding No. VI Is Supported by the Evidence.

Finding No. VI covers the well established facts that when the shipment arrived at West Sacramento, H. L. Coon, as owner of said horses and mules and also as consignee, unloaded them from the cars into said wooden corrals, watered, fed and took exclusive custody and possession of them, and from that time until after 4:30 P.M.

on the 18th day of December (after the delivery of the diversion order and the reloading of the horses and mules) the defendant Southern Pacific Company had no possession or control of them. The appellant criticized this finding for the following reasons, that is:

(1) Contends that the way-bill and uniform livestock contract shows the animals were owned by Haas Owens. In fact these documents do not show ownership, but merely show that Haas Owens was the consignor and that H. L. Coon was the consignee. However, the evidence shows that Coon was the owner (R 150).

(2) The appellant contends that the Southern Pacific Company employees assisted Mr. Coon in unloading the animals and did on two occasions the following day go to the corral to observe the animals and see for their needs. There is no evidence to support this. Mr. Perine testified that he did not assist in the unloading but merely counted and inspected the animals when in the corrals. There is no evidence that he went to the corrals on December 17 for any specific purpose. To the contrary, the evidence was that Mr. Perine merely passed by the corrals on his way to see his mother and returning therefrom while off duty.

(3) The appellant keeps insisting that no receipt for the delivery of said animals was given until the animals arrived at Santa Rosa, California. There is no evidence to support this construction of the evidence for the reason that no receipt was given either at Santa Rosa or Sacramento. The document that Mr. Coon signed at Santa Rosa was not a receipt but it was a certificate, certifying that all the horses, mules, etc., received in Santa Rosa, California, in two designated cars were purchased by "me from Haas Owens" and were slaughtered in Santa Rosa, California, within thirty days after arrival. This certificate was necessary because

horses and mules to be slaughtered are transported at a different and cheaper rate than other horses.

(d) Finding No. VII Is Supported by the Evidence.

Appellant challenges the finding that while said animals were in the exclusive care, custody, control, ownership and/or maintenance of said H. L. Coon, the latter, without any participating act or omission by the defendant Southern Pacific Company, negligently and carelessly permitted said horses and mules to stray. We have already demonstrated that said finding finds ample support in the evidence.

III.

CONCLUSION

We believe that the foregoing shows conclusively that, aside from the well established jurisdictional question, the case before the District Court was one of fact not law. It was resolved against appellant upon substantial evidence. The judgment should be affirmed.

Respectfully submitted,

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